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Trust, Bruce McGimsey, Jerry
McGimsey, Sharon McGimsey and
Johnny Clark

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:)
USA COMMERCIAL MORTGAGE COMPANY,)
Debtor.)
USA CAPITAL REALTY ADVISORS, LLC,)
Debtor.)
USA CAPITAL DIVERSIFIED TRUST DEED)
FUND, LLC,)
Debtor.)
USA CAPITAL FIRST TRUST DEED)
FUND, LLC,)
Debtor.)
USA SECURITIES, LLC,)
Debtor.)

Case No. BK-S-06-10725 LBR
Case No. BK-S-06-10726 LBR
Case No. BK-S-06-10727 LBR
Case No. BK-S-06-10728 LBR
Case No. BK-S-06-10729 LBR

Chapter 11

RESPONSE AND OBJECTION TO
MOTION TO ESTABLISH
DISPUTED CLAIM RESERVE

Date: 12/05/07
Time: 9:30 a.m.

Affects:)
☐ All Debtors)
☐ USA Commercial Mortgage Company)
☐ USA Securities, LLC)
☐ USA Capital Realty Advisors, LLC)
☒ USA Capital Diversified Trust Deed)
Fund, LLC)
☐ USA First Trust Deed Fund, LLC)

COME NOW Creditors Margaret B. McGimsey Trust, Bruce McGimsey, Sharon McGimsey,
Jerry McGimsey and Johnny Clark (collectively referred to as "McGimsey"), by and through their

1 attorney, William L. McGimsey, Esq., and file the within Response and Objection to Motion to
2 Establish Disputed Claim Reserve.

3 As the Motion indicates, the claimants are Diversified Members who have filed creditor claims
4 in the amount of \$592,825.45. Those creditor claims have not been objected to and no objection to
5 those claims is as of yet pending. An attempt to object to the claims was made on the basis that such
6 claims should be subordinated under U.S.C. §510(b). This Court had a hearing in that proceeding and
7 disallowed the McGimsey claims. On appeal, the Bankruptcy Appellate Panel decided nothing more
8 than that there had been no basis to disallow the claims and if the claims were to be subordinated an
9 adversary proceeding would be required.

10 The Movants here still do not object to the claims nor do they say that the claims are not
11 appropriate. They instead simply assert that the claims will ultimately be subordinated. In support of
12 that proposition, it has attached to its Motion a Memorandum opinion from the Bankruptcy Appellate
13 Panel, not to be published, which goes into some discussion about why that particular Appellate Panel
14 felt that ultimately the McGimsey claims would in fact be subordinated. The matter was never raised,
15 briefed nor argued. The question of whether or not subordination is appropriate is before this Court
16 in an adversary proceeding which has not even yet begun the discovery process.

17 It is interesting to note that in that very opinion at page 12 thereof in footnote 7, the
18 Bankruptcy Appellate Panel noted as follows:

19 It is true that the Committee argued that Appellants' claims should be
20 disallowed as they are derivative claims that belong to Diversified and
21 not to equity holders individually. Similarly, the Committee argued
22 that Appellants could not have a claim based on breach of contract as
23 a matter of law. However, as the bankruptcy court did not rule on
these arguments and instead based its entire ruling on the argument
that the proofs of claim and the proofs of interest are duplicative, we
decline to address them.

24 This position is entirely correct and one which McGimsey claimants agree. That is positions which
25 were not raised below, argued nor decided are not an appropriate subject for a decision by the
26 Appellate Court.

27 Notwithstanding this, the Bankruptcy Appellate Panel took it upon itself to opine, in what
28 McGimsey claimants say is nothing more than an advisory opinion, on the issue of subordination

1 pursuant to §510(b) which again had never been raised below, argued below nor argued before the
2 Bankruptcy Appellate Panel.

3 The result is that the McGimsey claims have not been objected to and have not been
4 disallowed. There is no basis whatsoever for determining that the claims' value is less than the
5 claimed amount. Even if the claims were to be subordinated, they would still be claims in the amounts
6 claimed.

7 Nevertheless, for the purpose of the distribution of \$3,000,000.00 to the Diversified Members,
8 the McGimsey claimants will consent to have said \$3,000,000.00 distributed without any reserve for
9 the McGimsey claims, but only at this time for the purpose of this distribution.

10 Respectfully submitted,

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12 s// William L. McGimsey
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